

PUBLIC DEFENDER NEWS

CHIEF'S CORNER

The Office of the State Public Defender is approaching its tenth year as an integrated, state-wide defender system. A good number of us have been around long enough to remember the days pre-OPD, and some of you have been with the agency since the doors opened. Much of the workforce that is the backbone of OPD joined the ranks more recently. I'd like to go back in time, and recall the forces that led to the creation of OPD almost ten years ago.

The genesis of the Montana Public Defender Act, codified in Title 47, was a class action lawsuit filed in the First Judicial District Court in 2002 by the American Civil Liberties Union. The lawsuit alleged that the state and several counties failed to provide constitutionally and statutorily adequate legal representation to indigent persons in criminal cases. The Montana Appellate Defender Office, created in 1991 (ch. 781, L. 1991), provided public defense representation to indigent persons in appellate and post-conviction proceedings. However, Montana had no systemic delivery system for representation at the level of district courts and courts of limited jurisdiction.

A bill to create a state-wide public defense program was introduced in the 2003 legislature. Senate Bill (SB) 218 provided for public defenders in district court cases on behalf of indigent defendants; youth in proceedings held pursuant to Title 41; and, persons who are the subject of a petition for commitment under 53-21-121, MCA. Funding would be handled through a transfer of approximately \$5.5 million from the judiciary to the public defender agency. SB 218 died in committee toward the end of the 2003 session.

The concept of a state-wide public defender delivery system remained a legislative priority, despite the failure of SB 218. Public defense issues were taken up by the Law and Justice Interim Committee, a joint bipartisan committee of the legislature that meets between legislative sessions. The Committee initiated a study of public defense issues and policy options. Over a span of 10 months, the Committee held numerous meetings and considered



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SPECIAL POINTS OF INTEREST

- A Job Well Done
- Success Stories, Awards, and More Awards!
- Zealous Defense Training

input from the Chief Justice of the Montana Supreme Court, the District Court Council, the Montana Association of Criminal Defense Lawyers, the Attorney General, the Montana County Attorneys' Association, the Montana Association of Counties, and national public defender groups, including the National Legal Aid & Defender Association. Public defense leaders

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from North Dakota, Oregon, Wyoming and Colorado appeared and offered observations and recommendations.

In May, 2004 the ACLU and the State agreed to hold the case in abeyance in order to permit the 2005 Montana Legislature to consider and pass legislation that would adequately address the issues. In a Stipulation filed with the Court, the parties agreed that "a properly funded state-wide public defender system with sufficient administrative and financial resources is necessary to ensure that indigent criminal defendants receive constitutionally and statutorily adequate legal representation[.]" and that the state legislature must be included in the formulation of any state-wide delivery system. The lawsuit was stayed pending action in the 2005 legislative session.

The Law and Justice Interim Committee issued in December 2004 a report, *For the Defense: Enacting a Statewide Public Defender System in Montana*, a

Report to the 59th Legislature. At the time of the report, persons were entitled in certain cases to legal counsel at public expense. This right to counsel most often was limited to those cases in which the person was indigent and unable to hire an attorney. In a limited number of cases, persons were entitled to appointment of an attorney regardless of income level.

The method of delivery of public defense services was a local decision. Some cities and counties established a public defender office. In other municipalities and counties, private attorneys had contracts with the city or county. In still others, a judge directly appointed an attorney on a case-by-case basis.

Accurate district court caseload data could not be obtained, however, as the state lacked the capability to accurately track public defender caseloads on a state-wide basis. As noted in the Committee report, there simply was no centralized database. Accurate data also could not be obtained because there was no standard definition of indigence. Each court might define indigence differently and use different standards to define when a person was entitled to the assistance of a public defender. The accuracy of the data also depended on how uniformly classification was done in each county. As the Interim Committee summed up, "the caseload data available to the [Interim Committee] and the percentages reported above should be considered 'soft' and incomplete."

Expenses were difficult to track as well. By policy, the hourly rate for public defense work by contracted or appointed attorneys was \$60 an hour, which included all expenses for support services. A judge could issue an order approving other expenses. During a six-month period in 2003, 182 different court-appointed or county-contracted private attorneys and law firms were paid for public defender services, but the Committee found that "no more specific data than this is available because invoices submitted are not automated or entered into a data base where caseload information can be tied to the bills paid[.]"

Similar problems were encountered in the courts of limited jurisdiction. Data was not uniformly collected and only partially reported in the justice's courts. City and municipal court caseload data was unavailable.

The Law and Justice Interim Committee considered three options for public defender services:

Option A: retain the existing system and await resolution of the ACLU lawsuit.

Option B: develop a hybrid system where the state would set policy and standards and manage a state contracted services program, so that judges would no longer appoint public defenders on a case-by-case basis, and county public defender offices would be locally controlled. Oversight of public defenders would essentially remain under the auspices of the judicial branch.

Option C: develop a statewide public defender system managed and supervised by a state public defender office.

It was clear to the Committee, after receiving “input and testimony from numerous stakeholders,” that “there was overwhelming support for and compelling issues weighing in favor of Option C.” The Committee voted unanimously to pursue development of a statewide public defender system, with an independent Commission “to supervise and direct the system.”

The members of the Interim Committee “deliberated all the research it could gather, considered testimony from all stakeholders who became involved in the process, and worked diligently to formulate a bipartisan policy.” That policy was reflected in LC 214, the Montana Public Defender Act, which was introduced in the 2005 Legislature and enacted as SB 146.

The Public Defender Commission and the Office of the State Public Defender were formed following the end of the 2005 Legislative Session, and the Office began operations on July 1, 2006 with 90.25 FTE in 14 locations across the state. It was a good start in the effort to provide equal access to justice throughout Montana.

Bill



A JOB WELL DONE

Fritz Gillespie, PDC Chair

Longtime public defender commissioner Chuck Petaja will be leaving the Public Defender Commission on July 1, 2015. Chuck was a public defender during the days of court appointments and having to ask the judge for authority to hire investigators, experts, and testing or evaluations. He has represented citizens accused of crimes throughout his career. Chuck was admitted to practice in 1969, well before many current public defenders were born.

Chuck was nominated to the PDC by the State Bar to fill the statutory slot of “an attorney experienced in felony defense with a minimum of one year as a full-time public defender.” He was appointed to the PDC in October 2009. He has served on the collective bargaining committee and the contracts steering committee ever since. He was appointed to the personnel committee in August 2010. Chuck took on the eligibility and cost recovery and the strategic planning committees in December 2011, making significant contributions on those committees as well as the others. The PDC and OPD will miss his wisdom, experience, counsel, and effort. Thank you Chuck for a job well done!



APPELLATE NEWS

When Sentencing Goes Sideways: When and How to Make Your Objection

Natalie Wicklund, Assistant Appellate Defender

We've all been there. We've all had a sentencing hearing, where either the procedure or the testimony goes a little haywire, and then you are left with a pile of bad options: aggressively or unpreparedly cross the State's witness, rehabilitate your own witness, or cross your fingers and hope the judge didn't notice.

Because sentencing hearings don't employ the rules of evidence, it's hard to know the best or proper way to "pump the brakes" on a runaway sentencing hearing. However, a well-timed objection and/or motion to continue might give your client instant relief, or preserve the record for a strong appellate issue.

The Montana Supreme Court has been clear that a Defendant has a "fundamental due process right to explain, argue, and rebut any information that may lead to a deprivation of life or liberty." *State v. Roedel*, 2007 MT 291, ¶ 65; *see also State v. Winkle*, 2002 MT 312, ¶ 14; *State v. Allen*, 2001 MT 266, ¶ 18. This right comes from the 14th Amendment of the U.S. Constitution and Article II, Section 17 of the Montana Constitution.

There is also a mirrored statutory right, "The Court shall afford the parties an opportunity to be heard on

any matter relevant to the disposition." Mont. Code Ann. § 46-18-115. This statute is especially helpful, if the judge skips your defendant's opportunity to make a statement or if the victim/complainant's testimony brings in new material facts – check out 46-18-115(3); (4)(c).

Best practice to preserve these issues requires an objection and a motion to continue after the unexpected testimony. It's best to make your motion before your cross-examination. Explain to the judge that your client has the right to explain, argue, or rebut

the damaging testimony and that in order to do so, you need more time to prepare or investigate the witness's statements/claims/wild accusations. The judge may instruct you to cross-examine and do your best. To really bolster the record, renew your motion after your cross. The remedy for "wild testimony" that impedes this right is more time to prepare or investigate the witness's claims. You may want to also consult with your client, especially if they have been impatient or eager to go to sentencing.

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We can't control what gets said in court. However, we can try our best to preserve our client's fundamental rights and guide them through the process. Sentencing hearings can be tough and unpredictable, but in the event they go sideways, a well-timed objection may make a world of difference.

LEGISLATIVE UPDATE

The 64th Legislative Session ended on April 28, 2015. Harry Freebourn recently provided an OPD [funding summary](#).

The Legislature also established three entities to study various aspects of the criminal justice system. HB 430 created a Judicial Redistricting Commission, SB 224 established a Commission on Sentencing, and of most interest to us, HB 627 created a Task Force on State Public Defender Operations. The OPD Task Force is still being formed. Updates on their activities will be posted on the legislative [website](#).



TIPS AND TRICKS

Cathy Doyle

The annual Support Staff Training Conference was held in Billings April 30-May 1. This year, in addition to legal topics and JustWare presentations, four lab-based Word and Excel classes were presented by Entré Technology Services. Here are some highlights from “Best Kept Secrets of Word and Outlook.”

The Quick Access Toolbar is Your New BFF

What the heck is the Quick Access Toolbar (QAT)? It looks like this, above your tabs:



The QAT provides shortcuts to your favorite commands. It is especially useful for adding commands that are not on the ribbon, or that you navigate to frequently. That little dropdown arrow is what you will use to add items to your QAT. Click on the arrow and choose “More Commands.” The next dropdown will present you with Popular Commands by default, or you can choose Commands Not on the Ribbon, or All Commands. Some of my favorites are Quick Print, Envelope, Print Preview and Edit, Watermark (I can never find that thing when I’m navigating!), and Shrink to Fit. I am such a huge fan of the Format Painter that I have it on the QAT so it is available even when I don’t have the Home tab open.

I like to show the QAT below the ribbon, so now it looks like this:



You can edit the QAT in other programs too (e.g. Excel and Outlook), but the changes don’t cross over from one program to another. In Excel I like Freeze Panes and Merge and Center.

Keyboard Shortcuts

Most of us are familiar with shortcuts such as Ctrl-c, Ctrl-x and Ctrl-v for copy, cut and paste; or Ctrl-b, Ctrl-i, and Ctrl-u for **bold**, *italic* and underline. Here are some other useful shortcuts that work in Word and some other programs:

Ctrl-a	Select all
Ctrl-f	Find text/data in a file (this works in virtually all programs, including PDF files and web pages)
Ctrl-p	Print
Ctrl-s	Save
F7	Spell check
F12	Save as (new name and/or file type)
Shift-F3	Cycle to change text to Title Case, ALL CAPS, all lower case
Alt-Tab	Cycle through open windows

If these are old hat, there are more! Contact Chris Thomas in the Training Department and see if her list has any that are new to you.

AND THE AWARD GOES TO . . .



Congratulations to **Gail Hikel**, Lewistown, winner of the April Support Staff Employee of the Month award. Gail was recognized for making the office transition from paper to paperless smooth and efficient, “despite being of the ‘non-tech’ generation.”

The May award went to **Elise Turcotte**, Billings. Elise pitches in to help with phone calls, discovery and closing files despite her own heavy workload. She maintains a caring attitude towards her co-workers and is “an inspiration to work with.”

The June recipient was **Lissa Powers**, Miles City. “In addition to her normal duties as an investigator, Lissa also played the role of admin assistant this month and really helped our office out. As a small office we have to pull together ... and because of her we did.”

Several awards were presented at the Support Staff Annual Conference April 30-May 1:

- ♦ **Jamie Moore**, Havre, *Administrative Support Employee of the Year*
- ♦ **Margarita Pazos**, Billings, *Outstanding Achievement*
- ♦ **Melanie Dodge**, Missoula, *Direct Legal Support*
- ♦ **Annie and Catterra Schafer**, Glendive, *Teamwork*
- ♦ **Britton Frisbie**, Billings, *Five-Year Service Certificate*

Thank you all for your contributions to OPD and to our clients!

HONORED TO BE ON THE TEAM

*Jamie Moore,
Administrative Support Employee of the Year*

I want to take this opportunity to let everyone know how truly honored I am to work with such a wonderful group of people. When I told Cathy Huston that I received the Support Staff of the Year award, she asked if I had given a speech. I told her that I was so speechless that nothing was coming out but thank you...thank you...thank you.

I am proud to be a part of such a fantastic organization. I find myself in support of people from every direction, which has helped me become more efficient and given me the ability to assist others in any way possible. I believe that OPD is given a tall order daily and that everyone has to work as a team to get the job done, as we can see from all of the recent “kudos” e-mails. We do have a great team and I look forward to playing on our field for many years to come.

A special thanks to a great boss, Kaydee Snipes, my biggest cheerleader! I wouldn't trade her for anything and I tell her that daily (although I do miss Tom giving me something new to pick on him about weekly). Many thanks to all of my fantastic co-workers!



Billings team members welcomed support staff from around the state to another successful Annual Conference.



SUCCESS STORIES

Bill Hooks



“Success” in the realm of public defense has many different forms. Dismissal of a charge and a verdict of “not guilty” certainly qualify as successes. Positive outcomes are found in pre-trial

advocacy, appropriate negotiated dispositions, and sentences that are appropriate to the offense. Our clients also win when, through our hard work and grit, fundamental constitutional guarantees are realized. By any definition, we have a number of successes to note.

Region 8 had two notable outcomes. Annie DeWolf, Diana Copeland and the staff in Bozeman won an acquittal for a client on a sexual intercourse without consent charge. Then, Region 8 obtained dismissal of two felony charges on pretrial motions. Their client was charged with an attempted assault and a drug offense. His fitness to proceed was questioned, and the court granted the state’s motion and ordered that the accused be transported to MSH for an evaluation. Months went by, and the accused remained in the county detention facility. The court eventually granted defense motions to dismiss on speedy trial grounds, and for violation of the accused’s due process rights. The court noted in the order of dismissal that the state could not locate the complaining witness in the attempted assault case, and the other case was “a routine drug case.” The court found the due process violation was “egregious.”

Joe Zavatsky and crew are doing good things in Region 11. Joe recently tried the first jury trial held in Treasure County (for those of you who are west of Billings, the county seat is Hysham, “Montana’s Hidden Treasure”) in 15 years. Joe won an acquittal for his client on a fish and game charge. Joe also

successfully moved to suppress evidence and get a drug charge dismissed, when the judge agreed after a hearing that the search was not a lawful plain view search.

The folks in Kalispell (Region 1) are dealing with a notable First Amendment constitutional challenge. Our client posted messages on social media regarding religious groups. The prosecutor filed criminal defamation charges. The case caught the eye of Prof. Eugene Volokh, who commented on the case in his blog, *The Volokh Conspiracy*. The article also appeared in the *Washington Post*. Stay tuned for further details of this prosecution for “hate speech.” Also in Kalispell, Greg Rapkoch prevailed in two felony trials. One ended with a hung jury on a felony DUI charge involving a single car accident. The second trial resulted in an acquittal on a charge of possession of methamphetamine based on residue.

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Jennifer Call and Walt Hennessey won an acquittal on an assault with a weapon charge in Anaconda (Region 5); Brad Custer (Region 4) won a

PFMA jury trial, and Scott Shellenberger won a notable victory in Havre (Region 6): a directed verdict of acquittal on a count of aggravated burglary; guilty on a PFMA count (the officers saw the accused punch his brother); and not guilty on a criminal mischief charge.

In Region 2, Jonathan Zundel prevailed in a Missoula municipal court bench trial on a charge of “spice” DUI; Kelly Henkel won in a bench trial when the prosecutor moved to dismiss mid-trial; Tom Schoenleben got a “not guilty” verdict on a 3rd offense DUI in Hamilton; Tom and Johnna Sutton won a criminal endangerment case; and Johnna took a DUI case to trial and hung the jury for a mistrial.

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SUCCESS STORIES CONTINUED FROM PG 7

Also in Missoula, Susan Boyer and Chris Daly, ably assisted by Mark Beck and Melanie Dodge, won a “not guilty” verdict on a charge of assault with a weapon. The jury convicted on a misdemeanor attempted assault on a peace officer. As Regional Deputy Dave Stenerson aptly noted, this is yet another example of in-the-trenches hard work and outstanding teamwork.

Victories are gained from efforts like this. Let me conclude with one final success story passed on by Dave Stenerson. It concerns a day-in-the-life of an OPD investigator, Mark Beck. As Mark tells it, “I went out to serve a subpoena to a person who probably doesn’t exist, by the name on the subpoena anyway, at an ‘address unknown.’ I went to the last known address from an April police report, for the person I’m pretty sure should be named on the subpoena, armed only with a dubious subpoena, my state ID card, and a photo snagged from Facebook.” After knocking on a windowless door for some time, a young lady opened the door slightly. “In the darkened shadows behind her I could see movement and my old cop senses told me that there was someone standing just behind the door, inches from me. I wanted to get out of there and move to a breathable – safe space but I knew if I didn’t stand there and get the needed information, there would most likely not be a second opportunity.” After returning to the office empty-handed, Mark said he questioned why, and then realized the answer is obvious: “... and then I think, this is what we all go through every stinkin’ day to make sure that someone doesn’t get their constitutional rights trampled upon, and we do a damned good job, every one of us, pretty much just because that’s the way we do it.”

Success takes on many forms. Every day, you all contribute to the success of OPD on behalf of its clients. Thank you for the efforts you put forth.

Replace the word “problem” with the word “opportunity” in all your thoughts.

- Matthew Keith Groves

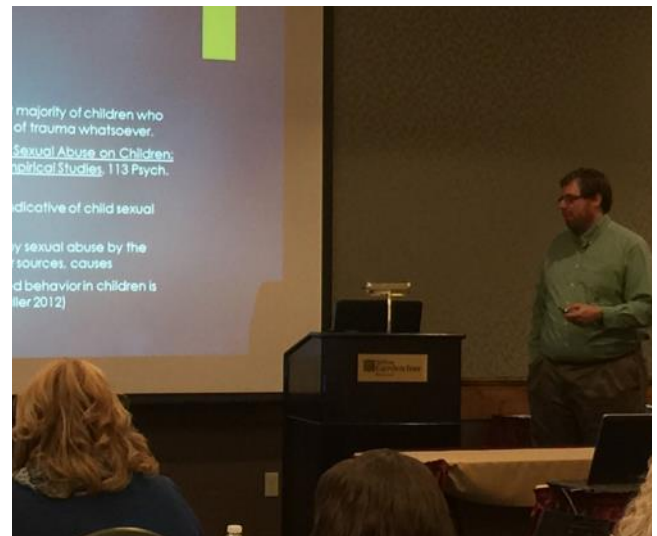
ZEALOUS DEFENSE TRAINING

Peter Ohman

In mid-May OPD held a two-day conference focused on the defense of sex crimes. Approximately 25 public defenders and contract attorneys gathered in Bozeman to learn from two of the best legal trainers Montana has ever seen.

Over the past few years Andre Vitale from Rochester, New York, has developed a national reputation as an expert in defending clients accused of sexual offenses. Dehlia Umunna of Harvard University is an unparalleled teacher, speaker, and creative thinker who provided attendees with many different ideas on how to craft their openings, closing, cross exams, etc.

The conference incorporated the “on your feet” approach, which has proven to be a more effective method of adult learning than the standard sit and listen CLE. More than one participant said it was one of the best CLEs they had ever attended. Thanks to Andre and Dehlia for making the trip out!



OPD’s own Chris Abbott was one of several home-grown contributing presenters, including Jen Streano, Casey Moore, Peter Ohman, Jennifer Hurley and Koan Mercer.

LOOK LIKE A PRO(FESSIONAL)

Email has become one of the primary modes of communication in both our personal and professional lives. While emoticons, abbreviations and witty signatures might be appropriate for personal correspondence, they don't belong at work. The way our messages look, as well as their content, reflect on ourselves and our agency.

Here are a few tips to up your professionalism quotient in business emails:

- Type in full sentences with proper sentence structure using proper capitalization and punctuation.
- Check for spelling, punctuation and grammar errors. Use all caps and exclamation points sparingly. Double check grammar and spelling before hitting "send."
- Use an appropriate font and point size. For email, the best size is 10 to 12 point, preferably using a sans serif font such as Arial, Gill Sans or Calibri. Never use fonts that are script, loopy, or decorative (e.g., Comic Sans, Papyrus, Brush Script). Use italics only for emphasis.
- Avoid wild colors or any kind of background images or colors. Unless you would type something in bold red letters on business letterhead, don't do it in email.
- Keep your signature block professional—avoid personal opinions, inspirational quotes, images or other extraneous content. They are not only unprofessional, they can make your email quite large, contributing to mailbox size issues.

As always, remember that email isn't private, no matter what your confidentiality statement says. Email messages created, sent or retrieved over the state's system are the property of the State of Montana. Don't send anything that you wouldn't want your entire network of professional or personal contacts to see.

For more tips on email etiquette, see the [March 2014](#) edition of the newsletter.



Congratulations to Billings Office Manager Marilyn Pulver and her son Josh on the arrival of grandson Julius Thomas Pulver!

Negative experiences are like weeds. They can take root very easily. It takes virtually no care or attention for them to flourish. Positive experiences are more like flowers. They don't take root unless they are deliberately planted in the mind. Then once planted, to keep them there they must be tended.

—Holly Alastra, *Independent Record*